A **MOHD HANAFI RAMLY**

v.

PP

B HIGH COURT SABAH & SARAWAK, BINTULU
JOHN KO WAI SENG JC
[CRIMINAL APPEAL NO: 41A-01-2010 (BTU)]
20 APRIL 2011

C ***CRIMINAL LAW:*** *Penal Code - Section 354 - Using criminal force with intent to outrage modesty - Appeal against conviction and sentence - Whether eight year old victim understood nature and consequences of oath - Whether conviction based on uncorroborated evidence of child - Whether requirements under s. 133A Evidence Act 1950 complied - Whether conviction safe*

D ***EVIDENCE:*** *Corroboration - Child giving sworn evidence - Sexual offences - Whether requirements under s. 133A Evidence Act 1950 complied - Whether evidence admitted as unsworn evidence - Whether corroboration required*

EVIDENCE: *Witness - Child witness - Whether child understood nature and obligation of oath - Whether court held a preliminary inquiry to determine competency of child - Whether failure to comply with s. 133A Evidence Act 1950 fatal to conviction*

E

The appellant appealed against the decision of the learned Magistrate whereby the appellant was convicted under s. 354 of the Penal Code for having outraged the modesty of the victim ('PW4'), a child, by kissing her on the lips. The appellant was sentenced to three years' imprisonment and one stroke of whipping. The appellant appealed against the conviction and sentence on the following grounds, *ie*, (i) that PW4, being only eight years of age did not understand the nature and consequences of the oath because she had admitted during examination-in-chief that she did not know what the oath was; and (ii) that it is generally accepted in practice not to act on uncorroborated evidence of a child, particularly, in sexual offences.

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Held (allowing appeal; acquitting the appellant):

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(1) The judgment of Heliliah JCA in *PP v. Chan Wai Heng* did not support the proposition that a preliminary inquiry to be held by the court to determine the competency of PW4 was not legally mandatory. In that case, there was no fixed form of holding the inquiry but it is not necessary to hold a *voire dire* to ascertain the competency of a child witness to allow defence counsel to cross-examine. Nonetheless, the *Chan Wai Heng*'s case accepted the

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necessity for the court to ascertain the competency of the child witness in order to comply with s. 133A of the Evidence Act 1950 ('EA'). (para 13)

(2) The learned Magistrate had totally failed to comply with the provisions of s. 133A of the EA to satisfy herself before deciding whether PW4, a child of tender years, should have given sworn or unsworn evidence. The learned Magistrate had totally failed to direct her mind and consider the requirements of s. 133A of the EA. Failure to comply with s. 133A of the EA is fatal to the conviction and not curable under s. 422 of the Criminal Procedure Code. Thus, due to the failure to follow the mandatory procedure set by s. 133A of the EA, the conviction should be set aside; *Tajudin Salleh v. PP* (refd). (para 16)

(3) PW4's evidence could be admitted as unsworn evidence. Therefore, pursuant to the proviso to s. 133A of the EA, the court could not rely on her evidence unless that evidence was corroborated by some other material evidence in support thereof implicating the accused. (para 20)

(4) In view of the admission of coaching by the child witnesses, PW3 and PW4, it was highly unsafe to rely on the evidence of PW3 and PW4 without other independent evidence. The learned Magistrate failed to deal with this issue of coaching in her ruling. Such a non-direction amounts to misdirection in law and the appellant had been deprived of a fair trial as a result of her failure. (para 21)

(5) Had the learned Magistrate directed herself properly and correctly as to the need for independent corroborative evidence, it was doubtful that the appellant would have been convicted. The learned Magistrate had also failed to sufficiently warn herself as to the risk of convicting without such independent corroboration. There had been a misdirection which had occasioned a failure of justice which justified the setting aside of the appellant's conviction. (para 23)

Case(s) referred to:
Chiu Nang Hong v. PP [1964] 1 LNS 24 PC ***(refd)***
Din v. PP [1964] 1 LNS 33 FC ***(refd)***
Mohd Yusof Rahmat v. PP [2009] 2 CLJ 673 CA ***(refd)***
Muharam Anson v. PP [1980] 1 LNS 137 FC ***(refd)***
PP v. Chan Wai Heng [2008] 5 CLJ 805 CA ***(refd)***
Tajudin Salleh v. PP [2008] 2 CLJ 745 HC ***(refd)***
Yusaini Mat Adam v. PP [2000] 1 CLJ 206 HC ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 422
Evidence Act 1950, ss. 114(g), 133A
Penal Code, ss. 354, 509

For the appellant - David Kuok; M/s Wong, Orlando Chua & Kuok
For the respondent - Hairun Najmi; DPP

Reported by Amutha Suppayah

JUDGMENT

John Ko Wai Seng JC:

[1] The appellant appeals against the decision of the learned Magistrate given on 23 April 2010 at the Magistrate Court, Bintulu whereby the appellant was convicted on the first charge under s. 354 of the Penal Code for having on the 19 May 2009 at a school in the district of Bintulu, outraged the modesty of the victim M by kissing the victim on the lips. The appellant was sentenced to three years imprisonment and one stroke of whipping.

[2] The appellant had been acquitted of the second charge under s. 509 of the Penal Code of insulting the modesty of the victim by asking the same victim to take off her clothing and taking photographs of her.

[3] The appellant being dissatisfied with the said decision on the first charge has appealed against the conviction and sentence.

Section 133A Evidence Act 1950 (EA)

[4] The main ground of appeal under ground 2(f) of the Petition of Appeal is the competency of victim (PW4) as a witness in regards to PW4's understanding of the oath.

[5] It is the contention of learned counsel for the appellant that the victim (PW4) being only eight years of age did not understand the nature and consequences of the oath because she had admitted in the examination-in-chief that she did not know what the oath was. The full extract of the relevant part of the notes of proceedings (NOP) reads as follows (from middle of p. 33 of Record of Appeal (ROA)):

> DPP : My next witness the victim.
>
> PW4 - M
> Sworn and affirm oath in Bahasa Malaysia
> 8 years old
>
> Examination in Chief.

DPP : If we ask you in court you have to speak the truth or not? A

PW4 : I have to speak the truth.

DPP : If you speak not the truth?

PW4 : Police will put me in jail. B

DPP : Do you know what is this oath?

PW4 : I don't know.

[6] Later, PW4 admitted again in cross-examination that she neither understood the oath nor knew the nature or the implication of the oath. C The relevant part of the NOP reads as follows at p. 41 of the ROA:

DC : Just now you say you don't know about oath, do you understand oath?

PW4 : No I do not know what is oath. D

DC : So you don't understand the nature or the implication of the oath?

PW4 : No I don't understand the nature or the implication of the oath. E

[7] Learned DPP submitted that the victim (PW4)'s failure to understand the oath was not fatal because she comprehended that she has to tell the truth at p. 33 of the ROA (see above extract). Learned DPP had cited the case of *PP v. Chan Wai Heng* [2008] 5 CLJ 805; [2008] 5 MLJ 798 to support his proposition that a preliminary inquiry to be held by the court to determine the competency of PW4 is not legally mandatory. F

[8] The issue here primarily rests with what is the requirement of s. 133A of the EA which reads as follows: G

> 133A. Where, in any proceedings against any person for any offence, any child of tender years called as a witness does not in the opinion of the court understand the nature of an oath, his evidence may be received, though not given upon oath, if in the opinion of the court, he is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth; and his evidence, though not given on oath, but otherwise taken and reduced H

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A into writing in accordance with section 269 of the Criminal Procedure Code of the Federated Malay States shall be deemed to be a deposition within the meaning of that section:

[9] The Federal Court in the case of *Muharam Anson v. PP* [1980] 1 LNS 137 had accepted that when a child of tender years is called to be
B a witness the procedure is for the court to hold an inquiry to form an opinion if the child understood the nature of the oath to be sworn otherwise the child evidence will be admitted as unsworn evidence.

[10] Compliance according to the case of *Yusaini Mat Adam v. PP*
C [2000] 1 CLJ 206 with s. 133A EA as KC Vohrah J puts it means that if a witness of tender years is before the court, she (at p. 210):

... ought to have been examined as to whether she had sufficient appreciation of the solemnity of the occasion and the added responsibility of telling the truth over the ordinary duty to tell the truth
D on pain of punishment for perjury under s. 14 of the Oaths and Affirmation Act 1949. Only after the Sessions Court Judge had satisfied herself on the above should the child then have proceeded to take an oath or affirmation to tell the truth under the Oaths and Affirmation Act 1949 (see eg, the procedure adopted by the trial judge in *Tham Kai Yau & Ors v. PP* [1977] 1 MLJ 174 at 175 left column,
E C). Otherwise the child's evidence should have been taken and reduced in writing under s. 133A of the Evidence Act 1950.

[11] In the *Chan Wai Heng*'s case (*supra*) cited by learned counsel DPP, the notes of proceedings pertaining to the ascertainment of the
F child witness before the Sessions Court was set out in full in the judgment of the Court of Appeal from paras. 18 to 19 (at p. 807C to 808E *(ibid)*). The procedure adopted by the Sessions Judge was acceptable to the Court of Appeal because as observed by Heliliah JCA at para. 21 in p. 808H:

G It is to be noted that nowhere is there a proscribed a specific procedure to be observed in ascertaining the level of a child's understanding.

[12] In the judgment of Heliliah JCA she concluded from the notes of evidence as set out that (para. 33 at p. 814C *(ibid)*) "the Sessions
H Court Judge incorporated, as outlined above, a process by which he had formed his own satisfaction that the child witness SP7 in this case did not understand the oath and affirmation". She also noted (from the notes, the examination by the TPR (DPP)) as to the competency of SP7 in which the Sessions Judge had thereafter concluded and recorded

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in the notes of evidence that SP7 was sufficiently intelligent and understands the duty of speaking the truth to give unsworn evidence. Heliliah JCA then found (at para. 34 in p. 814E (*ibid*): A

> [34] Further to that the following is found in the grounds of judgment of the sessions court judge: B
>
> > The victim SP7 was nine years old when he testified in court. He is therefore a child of tender age and as such s. 133A of the Evidence Act 1950 must be followed. I tested SP7 on his ability to understand the nature of the oath and found out that he could not understand it. I then tested him whether he is possessed of sufficient intelligence to justify the reception of the C evidence and understand, the duty of speaking the truth through some questions that were posed to him by the learned DPP I found that SP7 was possessed of sufficient intelligence and understood the duty of speaking the truth. Hence, SP7 was allowed to testify and his evidence could be received in court. D

[13] With respect to the submission of learned DPP, the judgment of Heliliah JCA in *Chan Wai Heng*'s case (*supra*) does not support his proposition that a preliminary inquiry to be held by the court to determine the competency of PW4 is not legally mandatory. Rather, firstly, the Sessions Judge there did make an express finding that E the witness SP7 did not understand the oath in compliance with s. 133A of the EA and thereafter followed by what would be the first issue, checking the competency to be a witness after questioning by the DPP and not by the Sessions Judge and secondly the accused counsel there appealed on the ground that he was not given an opportunity to take F part in the questioning.

[14] This is the decision of the Heliliah JCA *Chan Wai Heng*'s case (*supra*) at para. 35 at p. 814 H (*ibid*):

> [35] It is clear from a scrutiny of the above mentioned paragraphs G that *the sessions court judge had satisfied himself that the child witness of seven years did not comprehend the oath and thereafter embarked on a process of ascertaining the child's level of understanding.* There does not appear to be merit in the contention of learned counsel for the respondent that in the process of ascertaining the competency of the child it is obligatory that the questions must have been posed by the sessions H court judge himself as a prerequisite to the admissibility of the evidence. There was here not a total absence of the inquiry of ascertaining the level of understanding of the child but suggestion that the child must be cross examined, in other words, that there should be conducted a *voire dire*. As indicated above the decision in *Sidek bin Ludan* did not contain that suggestion. We would disagree if it were to I be so suggested as it would not reflect the correct approach. *Moreover the grounds of judgment and the notes of evidence of the sessions court judge disclosed that he had indeed directed his mind to the requirements of s. 133A*

A before embarking on the process of permitting the prosecution to lead evidence on the acts that were committed on SP7 by the respondent. (emphasis added)

[15] What Heliliah JCA held is that there is no fixed form of holding the inquiry but it is not necessary to hold a *voire dire* (trial within a B trial) to ascertain the competency of a child witness to allow defence counsel to cross-examine. Nonetheless the *Chan Wai Heng*'s case (*supra*) accepted the necessity for the court to ascertain the competency of the child witness in order to comply with s. 133A of the EA 1950. *Chan Wai Heng*'s case (*supra*) had distinguished the *Yusaini*'s case C (*supra*) on the ground that in the *Yusaini* there was a total failure in that case by the court in question to take into account s. 133A EA.

[16] From the extracts of the NOP at ROA at p. 33, it has shown that the learned Magistrate had totally failed to comply with the D provisions of s. 133A of the EA by conducting an inquiry first or to satisfy herself before deciding whether PW4 a child of tender years should give sworn or unsworn evidence. The learned Magistrate had totally failed to direct her mind and consider the requirements of s. 133A of the EA. The victim (PW4) of eight years old was put on oath without this enquiry or satisfaction process being conducted by the E learned Magistrate as to competency to take the oath and there was no decision made by her as to PW4's competency to give unsworn evidence for the purpose of s. 133A of the EA.

[17] Since PW4 in the opening answers in her examination-in-chief F stated that she did not understand the nature of the oath and the consequences derived therefrom, the learned Magistrate should have been put on guard and should have either stopped the examination of PW4 under oath and conducted an inquiry on the issue to give sworn evidence or to satisfy herself as to whether PW4 should continue to give sworn or unsworn testimony. If PW4 is found to be incompetent to take G the oath yet still competent to give unsworn evidence, the learned Magistrate should then order PW4's testimony will be taken and reduced in writing in accordance with s. 133A of the EA.

[18] In the case of *Tajudin Salleh v. PP* [2008] 2 CLJ 745 it was held H that a failure to comply with s. 133A of the EA is fatal to the conviction and not curable under s. 422 of the Criminal Procedure Code.

[19] The learned Magistrate had failed to direct her mind to the requirements of s. 133A of the EA when put on notice by PW4 of her inability to understand the oath and based on the above cited authorities I on the failure of the learned Magistrate to follow the mandatory procedure set by s. 133A of the EA, the conviction should be set aside. Ground 2(f) of the Petition of Appeal is made out.

Corroboration

[20] The other grounds 2(b), 2(c) and 2(d) of the Petition of Appeal will be grouped and considered together.

(a) PW4's evidence can under the circumstances be only be admitted as unsworn evidence, as she appeared from the NOP to understand from having to speak the truth and could comprehend the questions put to her. If that is the case then it is specifically stated in the proviso to s. 133A of the EA that the court cannot rely on her evidence "unless that evidence is corroborated by some other material evidence in support thereof implicating the accused".

(b) Learned counsel for the appellant submitted that outraging modesty under s. 354 of the Penal Code (PC) is a sexual offence. It is a sound rule and generally accepted in practice not to act on uncorroborated evidence of a child, particularly, in sexual offences. In those circumstances, the learned Magistrate should herself of the danger of convicting the appellant on the uncorroborated evidence of PW4, and the warning must be expressly reflected in the judgment, (see the Privy Council's decision in *Chiu Nang Hong v. PP* [1964] 1 LNS 24; [1964] 1 MLJ 40 at p. 46B).

(c) On the need for corroboration in sexual offences, Thomson LP in speaking for the Federal Court in *Din v. PP* [1964] 1 LNS 33; [1964] MLJ 300 said that the need for corroboration in such cases springs not from the nature of the witness but from the nature of the offence and added at p. 301H:

> If, however, she complains of having been raped then both prudence and practice demand that her evidence should be corroborated.

(d) When children are involved, the need for corroboration is twofold according to *Mohd Yusof Rahmat v. PP* [2009] 2 CLJ 673, where the Court of Appeal said at para. [19] at p. 680D:

> ... We must not forget that we are here dealing with the evidence of a child offender years who is involved in an allegation of rape where even if she is an adult requires corroboration because a woman has a temptation to exaggerate an act of sexual connection, and for a child of tender years for his or her known aptitude to confuse fact with fantasy - see *Din v. PP* [1964] 1 LNS 33. We must distinguish between a statement that should be corroborated because of the nature of the offence eg, rape or corruption and that because the tender age of the witness. The first requires corroboration because the honesty of the witness may be questionable. These offences are easy to allege but difficult to disprove. The second because of the tender age of the witness who could be influenced by adults

A and his own imagination. The evaluation of evidence in each of the categories must be distinguished. Here in this instant case, we are faced with both the nature of the offence and tender age of the witness. Thus, the probative value of these corroborative evidence which were principally former statements by the victim is of little significance.

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(e) Learned counsel for the appellant submitted that in the present case, there was complete absence of corroboration, in the sense; there is no independent corroboration to implicate the appellant. In other words, there is no corroborative evidence of a cogent and irresistible character.

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(f) The court agrees with the submission of learned counsel for the appellant that viewing in totality of PW4's evidence it demonstrated that her evidence is full of doubt, contradictory and inconsistency based on the illustrations para. 6 (a) to (e) of his written submission at p. 7 to 11.

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(g) In respect of the conclusion from PW2's evidence that she saw PW4 as scared that evening and PW2 had concluded that must have been because she was alone, without more it was wrong for the learned Magistrate to substitute her conclusion against the conclusion of PW2 that PW4 was scared because of what the appellant had done to her. It would be different if PW2 had questioned PW4 and was told the reason why PW4 looked scared but this is not the case here. There was no other evidence at all to show the reason why PW4 was scared. The learned Magistrate should not "fill in the blanks" by her inference of guilt as against the appellant who should be given the benefit of the doubt. This piece of evidence is valueless to be used as corroboration of the evidence of PW4.

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G (h) The failure to call possible witnesses at the scene, Cikgu Ida and another Hilary also should result in an adverse inference drawn under s. 114(g) EA for not calling them and that their evidence could destroy whatever corroborative evidence that has been adduced by PW3 and PW5. There is also the issue of non-compliance with s. 133A EA by the learned Magistrate in respect of the child witnesses PW3 and PW5 giving sworn evidence to be used as corroboration for PW4 at the trial.

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(i) What is more damaging to the respondent's case which the learned Magistrate seems to ignore is the apparent coaching of the child witnesses PW3 and PW4.

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(i) (a) For PW3 (p. 31 of ROA):

DC : When you meet PPMA, did Kak Roselind coached *(sic)* you what to say?

PW3 : Yes Kak Roselind coached me to say.

DC : How about before you come to court, did Kak Roselind coach you what to say?

PW3 : Yes.

(ii) (b) For PW4 (p. 41/42 ROA):

DC : Before you come to court anyone coached you what to say say?

PW4 : No none coached me.

DC : Did Puan Zarina and Roselind teached you what to say?

PW4 : Yes. They teached me what to say.

In re-exam PW4 (p. 45 ROA) being questioned whether she had been coached or that her evidence is what she experienced or just a fabrication she said: "What I tell in court is what actually happened to me".

[21] The court agrees with the submission of learned counsel for the appellant in view of the admission of coaching by the PW3 and PW4 it would be highly unsafe to rely on the evidence of PW3 and PW4 without other independent evidence. Outraging modesty like other sexual offences is easy to allege but difficult to disprove, and the double difficulty is that both PW3 and PW4 were evidently coached to give evidence in court. In the case of *Mohd Yusof Rahmat v. PP* (*supra*) at 680F para. [19] James Foong JCA had touched on the need for corroboration for child witnesses because:

> … of the tender age of the witness who could be influenced by adults and his own imagination.

[22] The learned Magistrate failed to deal with this issue of coaching in her ruling. Such a non-direction amounts to misdirection in law and the appellant has been deprived of having a fair trial as a result of her failure. No other independent evidence other than the discredited corroborative evidence was also forthcoming from the respondent to bolster their case against the appellant.

[23] Had the learned Magistrate directed herself properly and correctly as to the need for independent corroborative evidence to enhance the corroborative evidence adduced which have all been discredited as aforesaid *inter alia* coaching to implicate the appellant as guilty of the charge, it is doubtful the appellant would have been convicted. Furthermore, the learned Magistrate had also failed to sufficiently warn herself under the circumstance as to the risk of convicting without such independent corroboration in her ruling as required by the Privy Council in *Chiu Nang Hong v. PP* (*supra*). The court will find that there has been a misdirection which has occasioned a failure of justice which justifies the setting aside of the conviction of the appellant. Grounds 2(b), (c) and 2(d) of the Petition of Appeal are all also made out.

Defence Witnesses

[24] Learned counsel for the appellant submitted that the learned Magistrate failed to take into consideration at all the evidence given by the appellant, the evidence given by DW2 (headmaster) and the evidence given by DW3 (teacher) who supported the appellant's evidence.

[25] In view that these are findings of facts based on the learned Magistrate's assessment of the demeanour and veracity of these witnesses before her, this court will be slow to interfere with her judgment on this. The appellant had not shown that there has been manifest error or wrongful exclusion in her assessment and discounting of this evidence adduced for the appellant's defence.

[26] The court would find that ground 2(a) of the petition is not made out.

Conclusion

[27] For the reasons stated above on grounds (b), (c), (d) and (f) the conviction of the appellant is not right and unsafe and ought to be set aside with the result that the appellant is acquitted of the charge.